§1.401(k)-0 Certain cash or deferred arrangements, table of contents.

This section contains the captions that appear in 1.401(k)-1.

> §1.401(k)-1 Certain cash or deferred arrangements.

- (a) General rules.
 - (1) Certain plans permitted to include cash or deferred arrangements.
- (2) Rules applicable to cash or deferred arrangements generally.
- (i) Definition of cash or deferred arrangement.
- (ii) Treatment of after-tax employee contributions.
- (iii) Treatment of elective contributions as plan assets.
- (3) Rules applicable to cash or deferred elections generally.
- (i) Definition of cash or deferred election.
- (ii) Requirement that amounts not be currently available.
- (iii) Amounts currently available.
- (iv) Certain one-time elections not treated as cash or deferred elections.
- (v) Tax treatment of employees.
- (vi) Examples.
- (4) Rules applicable to qualified cash or deferred arrangements.
- (i) Definition of qualified cash or deferred arrangement.
- (ii) Treatment of elective contributions as employer contributions.
- (iii) Tax treatment of employees.
- (iv) Application of nondiscrimination requirements to plan that includes a qualified cash or deferred arrangement.
- (5) Rules applicable to nonqualified cash or deferred arrangements.
- (i) Definition of nonqualified cash or deferred arrangement.
- (ii) Treatment of elective contributions as employer contributions.
- (iii) Tax treatment of employees.
- (iv) Qualification of plan that includes a nonqualified cash or deferred arrangement
- (6) Rules applicable to partnership cash or deferred arrangements.
- (i) Application of general rules.
- (ii) Definition of partnership cash or deferred arrangement.
- (A) General rule.
- (B) Timing of partner's cash or deferred election.
- (C) Transition rule for partnership cash or deferred elections. (iii) Treatment of certain matching con-
- tributions as elective contributions.
- (7) Rules applicable to collectively bargained plans.
- (i) In general.
- (ii) Example
- (b) Coverage and nondiscrimination requirements.

- (1) In general.
- (2) Actual deferral percentage test.
- (i) General rule.
- (ii) Rule for plan years beginning after 1979 and before 1987.
- (iii) Plan provision requirement.
- (3) Aggregation.
- (i) Aggregation of arrangements and plans.
- (ii) Restructuring and Permissive Aggregation.
- (4) Elective contributions taken into account under the actual deferral percentage test.
- (i) General rule.
- (ii) Elective contributions and qualified nonelective contributions used to satisfy actual contribution percentage test.
- (iii) Elective contributions for partners.
- (iv) Elective contributions not taken into account.
- (5) Qualified nonelective contributions and qualified matching contributions that may be taken into account under the actual deferral percentage test.
- (6) Examples.
- (c) Nonforfeitability requirement.
 - (1) General rule.
- (2) Example.
- (d) Distribution limitation.
- (1) General rule.
- (2) Rules applicable to hardship distributions.
- (i) Distribution must be on account of hardship.
- (ii) Limit on distributable amount.
- (iii) General hardship distribution standards.
- (A) Immediate and heavy financial need.
- (B) Distribution necessary to satisfy financial need.
- (iv) Deemed hardship distribution standards
- (A) Deemed immediate and heavy financial need
- (B) Distribution deemed necessary to satisfy financial need.
- (C) Commissioner may expand standards.
- (3) Rules applicable to distributions upon plan termination.
- (4) Rules applicable to distributions upon sale of assets or subsidiary.
- (i) Seller must maintain the plan.
- (ii) Employee must continue employment.
- (iii) Distribution must be in connection with disposition of assets or subsidiary.
- (iv) Definitions
- (A) Substantially all.
- (B) Unrelated employer.
- (5) Lump sum requirement for certain distributions.
- (6) Rules applicable to all distributions.
- (i) Impermissible distributions.
- (ii) Deemed distributions
- (iii) ESOP dividend distributions.
- (iv) Limitations apply after transfer.
- (v) Required consent.
- (7) Examples.

26 CFR Ch. I (4-1-02 Edition)

§ 1.401(k)-0

- (e) Additional requirements for qualified cash or deferred arrangements.
- Qualified profit-sharing, stock bonus, pre-ERISA money purchase or rural cooperative plan requirement.
- (2) Cash availability requirement.
- (3) Separate accounting requirement.
- (i) General rule.
- (ii) Failure to satisfy separate accounting requirement.
- (4) Limitations on cash or deferred arrangements of state and local governments and tax-exempt organizations.
- (5) One-year eligibility requirement.
- (6) Other benefits not contingent upon elective contributions.
- (i) General rule.
- (ii) Definition of other benefits.
- (iii) Effect of certain statutory limits.
- (iv) Nonqualified deferred compensation.
- (v) Plan loans and distributions.
- (vi) Examples.
- (7) Coordination with other plans.
- (8) Recordkeeping requirements.
- (9) Consistent application of separate lines of business rules.
- (f) Correction of excess contributions.
- (1) General rule.
- (i) Permissible correction methods.
- (ii) Combination of correction methods.
- (iii) Impermissible correction methods.
- (iv) Partial distributions.
- (2) Amount of excess contributions.
- (3) Recharacterization of excess contributions.
- (i) General rule.
- (ii) Treatment of recharacterized excess contributions.
- (iii) Additional rules.
- (A) Time of recharacterization.
- (B) Employee contributions must be permitted under plan.
- (C) Plans under which excess contributions may be recharacterized.
- (iv) Transition rules.
- (v) Example.
- (4) Corrective distribution of excess contributions (and income).
- (i) General rule.
- (ii) Income allocable to excess contributions.
- (A) General rule.
- (B) Method of allocating income.
- (C) Alternative method of allocating income.
- (D) Safe harbor method of allocating gap period income.
- (iii) No employee or spousal consent required.(iv) Treatment of corrective distributions
- as employer contributions.
 (v) Tax treatment of corrective distribu-
- tions.
 (A) General rule.
- (B) Rule for de minimis distributions.
- (C) Rule for certain 1987 and 1988 excess contributions.

- (vi) No reduction of required minimum distribution.
- (5) Rules applicable to all corrections.
- (i) Coordination with distribution of excess deferrals.
- (A) In general.
- (B) Treatment of excess contributions that reduce excess deferrals.
- (ii) Correction of family members.
- (iii) Matching contributions forfeited because of excess deferral or contribution.
- (6) Failure to correct.
- (i) Failure to correct within 2½ months after end of plan year.
- (ii) Failure to correct within 12 months after end of plan year.
- (7) Examples.
- (g) Definitions.
 - (1) Actual deferral percentage.
 - (i) General rule.
 - (ii) Actual deferral ratio.
 - (A) General rule
 - (B) Employee eligible under more than one arrangement.
 - (1) Highly compensated employees.
 - (2) Nonhighly compensated employees.
 - (3) Treatment of plans with different plan years.
- (C) Employees subject to family aggregation rules.
- (1) Aggregation of elective contributions and other amounts.
- (2) Effect on actual deferral percentage of nonhighly compensated employees.
- (3) Multiple family groups.
- (2) Compensation.
- (i) Years beginning after December 31, 1986.
- (ii) Years beginning before January 1, 1987.
- (A) General rule.
- (B) Nondiscrimination requirement.
- (3) Elective contributions.
- (4) Eligible employee.
- (i) General rule.
- (ii) Certain one-time elections.
- (5) Employee.
- (6) Employer.
- (7) Excess contributions and excess deferrals.
- (i) Excess contributions.
- (ii) Excess deferrals.
- (8) Highly compensated employees.
- (i) Plan years beginning after December 31, 1986
- (ii) Plan years beginning after December 31, 1979 and before January 1, 1987.
- (9) Matching contributions.
- (10) Nonelective contributions
- (11) Plan.
- (i) Application of section 410(b) rules.
- (ii) Modifications to section 410(b) rules.
- (A) In general.
- (B) Plans benefiting collective bargaining unit employees.
- (C) Multiemployer plans.
- (12) Pre-ERISA money purchase pension plan.

Internal Revenue Service, Treasury

- (13) Qualified matching contributions and qualified nonelective contributions.
- (i) Qualified matching contributions. (ii) Qualified nonelective contributions.
- (iii) Additional requirements.
- (14) Rural cooperative plan. (15) Section 401(k) plan.
- (16) Section 401(m) plan.
- (h) Effective dates.
 - (1) General rule.
 - (2) Collectively bargained plans.
- (3) Transition rules.
- (i) Cash or deferred arrangements in existence on June 27, 1974.
- (ii) Plan years beginning after December 31, 1979, and before January 1, 1992.
- (iii) Restructuring.
- (A) General rule.
- (B) Identification of component plans.
- (1) Minimum coverage requirement.
- (2) Commonality requirement.
- (4) State and local government plans.
- (i) Plans adopted before May 6, 1986.
- (ii) Plan years beginning before January 1, 1996.
- (iii) Collectively bargained plans.

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§1.401(k)-1 Certain cash or deferred arrangements.

(a) General rules—(1) Certain plans permitted to include cash or deferred arrangements. A plan, other than a profitsharing, stock bonus, pre-ERISA money purchase pension or rural cooperative plan, does not satisfy the requirements of section 401(a) if the plan includes a cash or deferred arrangement. A profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural cooperative plan does not fail to satisfy the requirements of section 401(a) merely because the plan includes a cash or deferred arrangement. A cash or deferred arrangement is part of a plan for purposes of this section if any contributions to the plan, or accruals or other benefits under the plan, are made or provided pursuant to the cash or deferred arrangement.

(2) Rules applicable to cash or deferred arrangements generally—(i) Definition of cash or deferred arrangement. Except as provided in paragraph (a)(2)(ii) of this section, a cash or deferred arrangement is an arrangement under which an eligible employee may make a cash or deferred election with respect to contributions to, or accruals or other benefits under, a plan that is intended to

satisfy the requirements of section 401(a) (including a contract that is intended to satisfy the requirements of section 403(a)).

(ii) Treatment of after-tax employee contributions. A cash or deferred arrangement does not include an arrangement under which amounts contributed under a plan at an employee's election are designated or treated at the time of contribution as after-tax employee contributions (e.g., by reporting the contributions as taxable income subject to applicable withholding requirements). See also section 414(h)(1). This is the case even if the employee's election to make after-tax employee contributions is made before the amounts subject to the election are currently available to the employee.

(iii) Treatment of elective contributions as plan assets. The extent to which elective contributions under a cash or deferred arrangement constitute plan assets for purposes of the prohibited transaction provisions of section 4975 of the Internal Revenue Code and title I of the Employee Retirement Income Security Act of 1974 is determined in accordance with regulations and rulings issued by the Department of Labor.

- (3) Rules applicable to cash or deferred elections generally—(i) Definition of cash or deferred election. A cash or deferred election is any election (or modification of an earlier election) by an employee to have the employer either-
- (A) Provide an amount to the emplovee in the form of cash or some other taxable benefit that is not currently available, or
- (B) Contribute an amount to a trust, or provide an accrual or other benefit. under a plan deferring the receipt of compensation.

A cash or deferred election includes a salary reduction agreement between an employee and employer under which a contribution is made under a plan only if the employee elects to reduce cash compensation or to forgo an increase in cash compensation.

(ii) Requirement that amounts not be currently available. A cash or deferred election can only be made with respect to an amount that is not currently available to the employee on the date